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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1964

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No.

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HEART OF ATLANTA MOTEL, INC., a Georgia Corporation,  
*Plaintiff*

v.

THE UNITED STATES OF AMERICA AND ROBERT F. KENNEDY  
AS THE ATTORNEY GENERAL OF THE UNITED STATES  
OF AMERICA

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**JURISDICTIONAL STATEMENT**

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A.

This is an appeal from a final judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, granting a permanent injunction. A copy of the opinion of the court and its order are attached hereto.

B.

(1) The complaint in this case was for a declaratory judgment brought pursuant to the provisions of the Declaratory Judgment Act which are set forth in 28 U.S.C.A. Sec. 2201 and Sec. 2202. The complaint also sought a temporary and permanent injunction to prevent the Attorney General from exercising the powers granted

unto him by the Civil Rights Act of 1964, which is an amendment to Section 2004 of the Revised Statute (42 U.S.C. 1971), as amended.

(2) The judgment entered in this case was dated July 22, 1964 and was entered of record on July 23, 1964. The notice of appeal was filed by plaintiff on July 22, 1964 and was amended on July 30 and July 31, 1964, both the notice and amendment being filed in the United States District Court for the Northern District, Atlanta Division.

(3 & 4) Section 206 (b) of the Civil Rights Act of 1964 provides as follows:

"An appeal from the final judgment of such court will lie to the Supreme Court."

We submit that this section of the statute confers jurisdiction upon this Court to hear this appeal and we submit that there is no necessity for citing cases to sustain the jurisdiction.

(5) It is the contention of the appellant that the entire Civil Rights Act of 1964 is unconstitutional because an integral part of that Act, that is, Title II, is unconstitutional. However, Title II of said Civil Rights Act of 1964 is that portion of the Act which is attacked by the complaint filed by the appellant. Title II of said Act reads as follows:

**"TITLE II — INJUNCTIVE RELIEF AGAINST DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION"**

**SEC. 201. (a)** All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

**(b)** Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among

the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

(e) The provisions of this title shall not apply to a bona fide private club or other establishment not open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).

SEC. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

SEC. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.

SEC. 204. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice pro-

hibited by section 203, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

(b) In any action commenced pursuant to this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

(c) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

(d) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has no State or local law prohibiting such act or practice, a civil action may be brought under subsection (a): *Provided*, That the court may refer the matter to the Community Relations Service established by title X of this Act for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance, but for

not more than sixty days: *Provided further*, That upon expiration of such sixty-day period, the court may extend such period for an additional period, not to exceed a cumulative total of one hundred and twenty days, if it believes there then exists a reasonable possibility of securing voluntary compliance.

SEC. 205. The Service is authorized to make a full investigation of any complaint referred to it by the court under section 204 (d) and may hold such hearings with respect thereto as may be necessary. The Service shall conduct any hearings with respect to any such complaint in executive session, and shall not release any testimony given therein except by agreement of all parties involved in the complaint with the permission of the court, and the Service shall endeavor to bring about a voluntary settlement between the parties.

SEC. 206. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring acivil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such prevntive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) In any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge

court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

SEC. 207. (a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(b) The remedies provided in this title shall be the exclusive means of enforcing the rights hereby created,

but nothing in this title shall preclude any individual or any State or local agency from asserting any right created by any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations; or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right."

### C.

The principal legal question involved is whether Title II of the Civil Rights Act of 1964 violates any portion of the Constitution of the United States or the Amendments thereto; and if said Title II be unconstitutional, whether or not the whole Civil Rights Act of 1964 is unconstitutional. Appellant contends that the Constitution and the Fourteenth Amendment contains no prohibition limiting the right of a private individual to choose his customers and that Title II of the Civil Rights Act of 1964 (and the entire Act itself) is unconstitutional because:

1. Said Act exceeds the power to regulate commerce granted to Congress by Article I, Section 8, Clause 3, of the Constitution of the United States.
2. Said Act violates the Fifth Amendment to the Constitution of the United States in that it results in a taking of liberty and property without due process and for public use without just compensation, because it deprives plaintiff of its right to choose its customers and to operate its business as it sees fit, which was the right of the plaintiff possessed prior to the effective date of said Act.
3. Said Act violates the Thirteenth Amendment to the Constitution of the United States, in that, by requiring plaintiff to serve Negroes at plaintiff's motel against plaintiff's will, it subjects plaintiff to involuntary servitude, which is expressly prohibited by the Thirteenth Amendment.

## D.

It seems unnecessary to say more than to state simply that the issue raised by this case is of grave importance to every American. The issue of civil rights is ominous but the protection of the rights of all people is even more vital. The outcome of this case will determine whether or not the Constitution was designed to protect minority rights only or whether or not it was designed to protect those minority rights by the greater protection of the rights of all citizens.

In this case, the facts are that appellant's motel refused to rent rooms to a member of the Negro race prior to the enactment of the Civil Rights Act in 1964. Appellant stated in its complaint that it did not intend to serve members of the Negro race (R. 7) and filed suit to prevent the United States and the Attorney General from forcing the motel to accept Negro guests under the Civil Rights Act of 1964. (R. 7) The issues were formed by the admissions in the answer of the United States and of the Attorney General and by the stipulation of facts, which are set forth hereinafter (R. 17):

"One, Plaintiff owns and operates the Heart of Atlanta Motel in Atlanta, Georgia. The motel has 216 rooms for lease or hire for transient guests.

Two, Through various national advertising media, including magazines having national circulation, the plaintiff solicits patronage for the Motel from outside the State of Georgia.

Three, Plaintiff accepts convention trade from outside the State of Georgia.

Four, Approximately 75% of the total number of guests who register at the hotel are from outside the State of Georgia.

Five, Plaintiff maintains over fifty billboards and highway signs advertising the Motel on highways in Georgia."

The answer of the defendants below admitted that the plaintiff corporation operates no other business except the Heart of Atlanta Motel in Atlanta, Georgia, and admitted all other facts alleged (R. 21), except the allegations in the last sentence of paragraph 2 of the complaint and the allegations in paragraph 9 of the complaint that the United States of America had taken for public use part of the rights of the plaintiff in and to its property.

WHEREFORE appellant prays that this Court take jurisdiction of this appeal to the end that this cause may be reviewed and determined by this Court, in accordance with the Constitution of the United States, and as provided for by the statutes of the United States; and for such further relief as to this Court may seem proper.

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IN THE

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OCTOBER TERM, 1964

No. .

HEART OF ATLANTA MOTEL, INC., a Georgia Corporation,  
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THE UNITED STATES OF AMERICA AND ROBERT F. KENNEDY  
AS THE ATTORNEY GENERAL OF THE UNITED STATES  
OF AMERICA

**BRIEF**

**SUMMARY OF ARGUMENT**

Appellant alleged that Heart of Atlanta Motel had never accepted Negro guests and did not intend to do so, unless ordered by Court. The Civil Rights Act of 1964 commands appellant to accept Negro guests on the same basis as all other guests. The commands of said Act are the same as those in the Civil Rights Act of 1875. The Supreme Court of the United States held that the Civil Rights Act of 1875 was unconstitutional, and that is the law of the land unless this Court sees fit to reverse the previous decision.

The concurring and dissenting opinions of six Judges of this Court in the case of *Bell v. Maryland*, decided June 22, 1964, set forth arguments regarding the validity of a state anti-trespass law. These same arguments are pertinent to the instant case because a state anti-

trespass law gives statutory authority to an individual to exclude Negroes as his business guests, whereas the Civil Rights Act of 1964 establishes statutory prohibition of such choice. The two statutes are diametrically opposed in theory; if one is valid, the other must be invalid. Mr. Justice Black, Mr. Justice White and Mr. Justice Harlan concluded that the Maryland anti-trespass law was not forbidden by the Fourteenth Amendment and was constitutional. We believe this is the proper interpretation and submit that their logic would require that Title II of the Civil Rights Act of 1964 be declared unconstitutional.

We also concur with Mr. Chief Justice Warren's statement in the case of *Patterson, et al. v. City of Greenville* that:

"It cannot be disputed that under our decisions private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it."

In the instant case there is no state action of any kind involved. In the case of *Shelly v. Kraemer*, decided in 1948, it was held that the Fourteenth Amendment:

"erects no shield against merely private conduct however discriminatory or wrongful"

and

"... does not of itself, standing alone, in the absence of some cooperative state action or compulsion, forbid property holders, including restaurant owners, to ban people from entering or remaining upon their premises, even if the owners act out of racial prejudice."

Since the Constitution of the United States and the Fourteenth Amendment do not prohibit discrimination by an individual because of race and since Congress derives all of its power from the Constitution, it follows that

Congress had no authority to pass the Civil Rights Act of 1964 in order to prohibit racial discrimination.

If any single part of the Constitution is violated by the Civil Rights Act of 1964, then the Act is unconstitutional. Said Act violates the Fifth Amendment because it results in the taking of property and liberty of an individual without due process and without just compensation. Said Act is also unconstitutional because it forces the appellant to serve a person that it does not wish to serve and, therefore, subjects appellant to involuntary servitude in violation of the Thirteenth Amendment. In a recent decision in the Supreme Court of the State of Washington, there appears this appropriate and judicially accurate holding:

"Discrimination is but another word for free choice. In dealings between men, both cannot be free unless each acts voluntarily; otherwise one is subjected to the other's will."

We must assume that Congress knew of the constitutional objections to the Civil Rights Bill of 1964 when it was under consideration. It is significant that Congress tried to create certain rights for Negroes which did not otherwise exist under the Constitution, by basing said Act upon the commerce clause. Therein lies the great question. The legal problem of the prohibition of racial discrimination is important, but it is merely incidental to the overriding and fundamental issue as to how far Congress can exert its power over individual and personal liberty under the commerce clause. The Government has argued that Congress has simply exercised its full powers under the commerce clause in passing said Act and that the courts have no right to interfere. The other argument is that the Constitution is a "living document" and can be changed from time to time by Congress and the federal courts to meet the modern trends. But that is not what the Constitution says and that is not what the Framers

of the Constitution and those who adopted it intended. The Constitution provides by its own terms the method for amendment. The Framers of the Constitution had just been through a war to win individual liberty from a despotic and centralized government and they meant for the Constitution to protect themselves and their descendants from the evils of tyranny. If the Constitution doesn't mean what it says, and if the Congress or the federal judiciary can change its meaning to make it a "living Constitution", then we don't need the Constitution and it will become a mere scrap of paper if it can be changed by the two branches of the government which the Constitution itself created.

Mr. Justice Goldberg, in the *Bell v. Maryland* case, stated that:

"Our sworn duty to construe the Constitution requires, however, that we read it to effectuate the intent and purpose of the Framers."

We agree. It is the duty of the court not to construe the Constitution in a manner which the court thinks the Framers of the Constitution, if living, would adopt today; this court should construe the Constitution in accordance with the intentions of the Framers at the time it was drawn and in accordance with the intentions of those who adopted it at the time they adopted it. On the subject of discrimination and interstate commerce, their intentions, historically, can easily be ascertained as we have pointed out in the body of the brief.

The genius of the Constitution of the United States was the formation of a federal republic for the first time in history, whose uniqueness and singular strength was found in the balance of powers and the various restrictions placed upon each segment. The powers of the national government were divided among the executive, the legislative and the judicial, with each having certain restrictive

powers over the other. The powers of the national government were specified in the Constitution and the Bill of Rights with the final restriction on the federal government being contained in the Tenth Amendment, which reserved to the states and to the people all powers not specifically granted to the federal government.

The function of the Supreme Court of the United States is to maintain these balances of power within the national government and as between the national government and the states. If the Congress, by an act such as the Civil Rights Act of 1964, can by itself establish itself supreme in any field of legislation by saying that such field has a relationship to interstate commerce, and if this Supreme Court of the United States were to stand idly by and say that it can not interfere with this exercise of power by Congress, then the delicate balance invented and created by the Framers of the Constitution will be destroyed and there will be no further reason for the existence of this Supreme Court in this system of federalism.

Congress has said by Title II of the Civil Rights Act of 1964 that all motels are in interstate commerce and subject to the restrictions against racial discrimination because the people who use motels are part of interstate commerce. What, then, is the limitation beyond which Congress can not go and beyond which Congress can not regulate? Every person and every business affects commerce in some way and, if Congress' power is unlimited under the commerce clause, Congress can regulate every person and every business in any way it sees fit. Under the Civil Rights Act of 1964 Congress has not set up any standards by which to determine if a motel is in interstate commerce or materially affects interstate commerce. Congress could have just as well confiscated all motels, all air lines, all grocery stores and nationalized them on

the theory that they are in interstate commerce or affect interstate commerce. In other words, where does the power of Congress cease under interstate commerce? If Congress has the right to prohibit racial discrimination, it is difficult to see the end to the power of Congress to restrict and prohibit individual freedom and liberty. It is not difficult to see that the final end result is a completely socialistic state where people and individual liberty are of little importance and where the welfare of the federal and national government are of supreme importance.

## ARGUMENT

### "LAW OF THE LAND"

It is most unusual for any appellant to find himself in any appellate court seeking to uphold a principal of law which, on the one hand, has already been decided by the Supreme Court of the United States and has been the law of the land for 81 years and which, on the other hand, has been the subject of another case in the Supreme Court of the United States within the last 80 days and has been examined and opinioned by six of the present Justices of this Court.

In 1883, 81 years ago, the Supreme Court of the United States held in the *Civil Rights Cases*, 109 U.S. 3, after eliminating all the obiter dicta, that the Civil Rights Act of 1875 was unconstitutional. In the words of the opinion:

"Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments."

The last three amendments referred to were the Thirteenth, Fourteenth and Fifteenth. And then the Court held that the Fourteenth Amendment did not breathe life into the 1875 Act. For several years now, much has been said and written and decided about the "law of the land." The

decision of the Supreme Court in 1883 has been the law of the land on this subject for 81 years and still is.

### **BELL v. MARYLAND**

In the case of *Bell v. Maryland*, 1963 Term, No. 12, decided on June 22, 1964, the present Justices of the Supreme Court of the United States had before them the anti-trespass statute of Maryland. The opinion of the Court, delivered by Mr. Justice Brennan, did not actually decide whether or not a state anti-trespass law was prohibited by the Constitution of the United States; the Court simply remanded the case to the Maryland Court of Appeals. However, in this same case, concurring opinions were written by The Chief Justice, Mr. Justice Douglas and Mr. Justice Goldberg which dealt at length with their views concerning the right to public accommodations by Negroes under the Fourteenth Amendment. Mr. Justice Black, Mr. Justice Harland and Mr. Justice White rendered a dissenting opinion on the same general subject. Therefore, appellant has the unique opportunity of being able to study in advance the reasoning of six of the nine Justices of this Court, which reasoning a party may reasonably expect said Justices to apply in the instant case unless this appellant can demonstrate in this appeal that some of the arguments and reasoning advanced are really illogical. In order to win, a lawyer must be pragmatic; therefore, the following argument regarding *Bell v. Maryland* must be made and it is made with the utmost respect for the Supreme Court of the United States and for each individual Justice thereof.

### **CONCURRING OPINION OF MR. JUSTICE DOUGLAS IN BELL v. MARYLAND**

Counsel for appellant is frankly amazed as to the type of theories advanced to support the concurring opinions of Mr. Justice Douglas in the *Bell v. Maryland* case because they are a radical departure from the time-honored reliance on case precedent, common law and inter-

pretation of statute law in accordance with the intentions of the Legislators. Mr. Justice Douglas based his conclusions that anti-trespass laws are unconstitutional and violate the Fourteenth Amendment because of **"modern trends"**, **"apartheid"**, **"the inventive genius of judges"**, **"the concept of travel in modern times"**, **"the right of mobility"**, **"corporate motivations"** and **"the preservation of the corporate veil"**. Counsel for appellant must be old-fashioned and behind the times if these are legal grounds upon which to determine the constitutionality of a statute. If these arguments were used by a young law student on his bar examination to practice law, counsel submits that he would never be granted a license. However, on the question of such national magnitude as the Civil Rights Act of 1964 and other alleged rights of the Negro, such discussions and arguments as advanced by Mr. Justice Douglas must be pertinent in this Court since they were used by such a distinguished jurist. Therefore, counsel would like to argue the principles laid down by Mr. Justice Douglas in this Court with the apology that such argument, we submit, is necessarily sociological, philosophical and political.

On page 13 of the concurring opinion of Mr. Justice Douglas, in discussing the Maryland anti-trespass law, Mr. Justice Douglas said:

**"We would reverse the modern trend were we to hold that property voluntarily serving the public can receive state protection when the owner refused to serve someone solely because they are colored."**

Let us hasten to point out that there is no state protection involved in the instant case. But basing the opinion on **"modern trend"** is the point that gives counsel trouble. One can justly ask what is the **"modern trend,"** that is, the thinking of the majority of the people of the United States regarding personal property rights and the erosion of protection of law for those personal property rights

leading to a possible complete subrogation of rights of individuals to centralized government in Washington, D. C. We submit that the "modern trend" today is **fear**; fear as to what the courts of this country will do next to sanction and uphold acts of state and federal governments in the elimination of personal liberty and rights by which individuals have been able to make their own decisions and live their own lives as they wished since the Constitution was adopted in 1787. The "modern trend" is fear of the concentration of power in the federal branches of government to the detriment of state and local government on matters which have traditionally been handled on local levels. The "modern trend" of our people is the fear that, if the federal government can tell a man how to run his own business, how long will it be before the same federal government, using the same theories for the expansion of the commerce power and the use of the Fourteenth Amendment, will extend its power to all businesses and to all phases of all businesses. Worst of all, the "modern trend" is fear that the federal judiciary, which is the last resort of free men for protection, will let down the people of this country and, instead of protecting freedom of the individual, will continue to protect the power of the federal government to interfere with that personal freedom. Counsel urges in all sincerity that if this fear of abandonment by the federal judiciary turns into a loss of faith in the federal judiciary, it would be in catastrophic proportions next only to loss of faith of our people in Almighty God. Reliance on modern trends will never protect the rights of any individuals, be he white or colored, but will only end in chaos. The rule of law, based on established and accepted legal principles, is the cornerstone of freedom.

The concurring opinion relies on the **right to travel** "in modern times" and the **"right of mobility in these times"** (see p. 18, *supra*) and upon the testimony of an official of the National Association for the Advancement of Colored

People (p. 10 of concurring opinion) about the difficulties of a colored man making an auto trip from Virginia to Mississippi, from Indiana to South Carolina and from Florida to Texas. Of course such testimony was not subject to cross-examination by someone who was familiar with the facts and no testimony of the other side of the coin was presented. The witness must have known of the existence of a travel directory, entitled "GO", which is the best and most comprehensive travel guide for Negro tourists. The NAACP official obviously refrained from testifying about the Astor Motel, The Fiesta Motel and the Triple "H" Motel in Jacksonville, Florida or the Miami Carver Hotel and the Hampton House Motel & Villas in Miami or the Sun-Glo Highway Hotel in Orlando, or the Anabel Motel in Pensacola or the Hotel Robert James in St. Petersburg or the Ebony Motel at Riviera Beach and the Abner-Virginia Motel and the Bert Hotel in Tallahassee. The testimony of the NAACP official failed to include information about Nationwide Hotel Association which has more than 60 members. His testimony was totally lacking in the enumeration of the many hotels in the Southeast who had accepted Negroes as well as white guests long before the passage of the Civil Rights Act of 1964.

The "**right of mobility**" referred to in the concurring opinion certainly does not appear in the Bill of Rights to the Constitution and we assume that it is a phrase coined to describe the **common law duty of innkeepers** to accept guests. Of course, it is a well stated principle of law in this country that the common law of England still prevails in this country except where it has been modified by statute. In the State of Georgia, the common law has been so modified under Code Section 52-103 of the Code of Georgia of 1933, as amended, which provides that where establishments which otherwise would be an innkeepers, entertained simply for the accommodation of travelers, they were not innkeepers but depositaries for hire. The facts in the instant case are that practically all of the guests of the Heart

of Atlanta Motel are transient and the **Heart of Atlanta Motel** under Georgia law is a depository for hire and not an innkeeper. Chapter 52-401 of said Georgia Code is a separate section entitled "Tourist Courts" and defines a tourist court as a "motor hotel." The Georgia Code specifies different regulations for governing innkeepers and hotels and operation of innkeepers and the operation of hotels, and prescribes criminal penalties that are applicable to a tourist court or motel but are not applicable to an innkeeper. The origin of an obligation of an innkeeper under common law was founded in the difficulty of that time of travelers in England (all of whom were white) in finding lodging wherever he ended his trip in any given day. The reason therefore was to help all travelers. Applying that theory of common law (even though, under Georgia statute, it does not apply to appellant) to the concept of traffic in modern times as referred to in the concurring opinion, would the Court hold that all 60,000 motels in the United States exist solely for the accommodation of travelers? We think not; yet the *Civil Rights Act of 1964* applies to all 60,000 motels. As the Justices of this Court know, in these modern times, there are many resort motels and hotels who do not cater to people moving from one place to another but rather cater to people who spend two weeks to three months, vacationing and resting in these resorts. There is no logical relation between a resort motel in these modern times, with swimming pools, game courts, golf course privileges, private beaches and other such facilities, with the typical inn existing in England during the development of the common law duty of an innkeeper. The Heart of Atlanta Motel is such a resort motel which caters to vacationers as well as business men. In its advertisements, referred to in the stipulations of fact before the trial court, this motel advertises itself in *Holiday Magazine* as a resort motel.

The concurring opinion calls apartheid a "relic of slavery" and as to the restaurant in the *Bell v. Maryland* case

the opinion stated that "private property is involved, but it is the property that is serving the public". We submit that the great majority of private businesses, operated upon private property, serve the public in that they offer goods or services for the use of or consumption by the public in order to satisfy the needs and wants of the public. In this context, we are not talking about a public utility such as the electric company or telephone company, or a common carrier or any other type of business that has an actual monopoly by virtue of licenses granted by public authorities; we refer to the ordinary business man and merchant who has something to sell to the public. The concurring opinion seems to say that in these times "a man's home or his yard or even his fields" are still sacred and subject to that individual's control. But if the Civil Rights Act of 1964 can tell a proprietor that he must do business with members of the Negro race, one might properly ask how long will a man's home or a man's yard or even his fields will be held inviolate. If a restaurant who uses a substantial portion of food that has moved in interstate commerce is thereby subject to the control of Congress, why aren't the fields of the individual farmer also subject to such control since the farmer buys fertilizer, seed and farm equipment that has moved in interstate commerce and without which he can grow nothing in his fields. If the Congress has the constitutional authority to enact the Civil Rights Act of 1964 to control the operation of motels, hotels, and restaurants because they are "serving the public", then Congress can also regulate, as it sees fit, the operation of department stores, drug stores, hardware stores, beauty parlors, barber shops, automobile agencies, real estate brokers, doctors, lawyers and ad infinitum.

The concurring opinion in the *Bell* case contained these statements:

"The corporation that owns this restaurant did not refuse service to these Negroes because 'it' did not like Negroes.

"The reason 'it' refused service was because 'it' thought 'it' could make more money by running a segregated restaurant."

"The point is that corporate motives in the retail field relate to corporate profits, corporate prestige, and corporate public relations."

"The corporate owners of a restaurant, like the corporate owners of streetcars, buses, telephones, and electric light and gas facilities, are interested in balance sheets and in profit and loss statements."

"A corporation may exclude Negroes if 'it' thinks 'it' can make more money doing so. 'It' may go along with community prejudices when the profit and loss statement will benefit; 'it' is unlikely to go against the current of community prejudice when profits are endangered."

**These statements suggest that there is something wrong with a corporation making money. We suggest that the free enterprise system, which has flourished in the United States under the protection of law at least until the passage of the Civil Rights Act, is the great success story of history and has produced a life free from boredom and drudgery, the like of which has never been known. But we refuse to accept the proposition that corporations are motivated by money only and have no other interest in our society. Corporations provide the civic leadership in most communities. Corporations provide the majority of all contributions to most charities including the United Fund Appeal, Boy Scouts, Girl Scouts, YWCA and YMCA. Corporations support the various Chambers of Commerce and provide a large part of the membership in Kiwanis, Rotary and other civic clubs who do a world of good for thousands of unfortunate people. Corporations provide most of the money for the nurture of the fine arts and for the endowment and operation of the great private universities in this country. The motivations of corporations can stand the greatest scrutiny, even from those who do not subscribe to our profit system, but the motivations of corporations should**

not be used as a basis for determining the constitutionality of an Act of Congress.

On page fourteen of the concurring opinion there appears this declaration:

"The duty of common carriers to carry all, regardless of race, creed, or color, was in part the product of the inventive genius of judges."

Legal analysis and legal interpretation and constitutional construction should rely on the intelligent genius but not the "inventive genius" of judges. **If the legal basis for the support of the Civil Rights Act of 1964 can not be found in the Constitution of the United States, we respectfully submit that no one has the right to invent a principle in order to sustain the Act.**

And finally, the concurring opinion of Mr. Justice Douglas on page 30, holds that the "**corporate veil**" should not be stripped from a corporate appellant because the appellant could then rely on the personal relationship between a business man and his customer, which the concurring opinion seems to hold should not be subject of control by Congress. This is a grasping for straws. As the final argument, the concurring opinion seems to say that the rights of individual business men should not be accorded to corporate business. This, too, is not in accordance with the ruling in the case of *Minnesota R. Company v. Beckworth*, 129 U.S. 26, in which the Supreme Court of the United States held that **corporations are "persons" within the meaning of the due process clause of the Fourteenth Amendment.**

Counsel agrees with one theory which was referred to in the concurring opinion but to which Mr. Justice Douglas obviously does not subscribe. On page 13, the opinion reads as follows:

"Charles A. Beard had the theory that the Constitution was 'an economic document drawn with superb

skill by men whose property interests were immediately at stake.' An Economic Interpretation of the Constitution of the United States (1939), p. 188. That school of thought would receive new impetus from an affirmance of these judgments. Seldom have modern cases (cf. the ill-starred Dred Scott decision, 19 How. 393) so exalted property in suppression of individual rights."

We submit that property can not be exalted in the suppression of individual rights. **Individual rights and individual liberty are dependent upon the ownership of private property.** They are 'inseparable from private property. The theory of the ownership of private property included, as an inherent ingredient, the freedom of any individual to use that property. Wherever the ownership of private property has disappeared on this earth, whether in Russia, Red China, Cuba, Hungary, Bulgaria or other Russian satellites, human freedom has also largely disappeared. If the incidences of ownership of private property continue to be swept away by either congressional acts or the "inventive genius of judges", individual liberty will slip from our hands.

**CONCURRING OPINION OF MR. JUSTICE GOLDBERG IN  
BELL v. MARYLAND**

Another concurring opinion in the case of *Bell v. Maryland* was written by Mr. Justice Goldberg with whom The Chief Justice joined and with whom Mr. Justice Douglas join in part. On page 29 is found the following statement:

"The relationship between the modern innkeeper or restaurateur and the customer is relatively impersonal and evanescent."

and on page 30 is found the following statement:

"Institutions such as these (lunch counters and soda fountains) serve essentially the same needs in modern life as did the innkeeper and the carrier at common law."

As a matter of fact, the average motel in the United States, totaling 60,000 in number, is a 40-50 unit motel owned and operated by a man and his wife who come in very close contact with every guest of the motel. In fact, **the personal contact, the friendliness of the manager and the extra courtesies shown by the manager to the individual guests are the special advantages of this average motel.** The relationship is highly personal and the economic benefits to the average motel are in direct proportion to the cordiality of the innkeeper. This is the concept of the modern innkeeper in modern life. But this is only a fact of economic life and not a legal principle upon which the constitutionality of an act of Congress should be decided.

The second concurring opinion held that "the denial of the constitutional right of Negroes to access to places of public accommodations perpetuates a cast system in the United States." We suggest that there will always be economic stratification in our society and that social stratification will continue to be largely determined by economics. We will always have the common man who does not and will not associate with kings or presidents. Abraham Lincoln is quoted as saying "The Lord must have loved the common man because he made so many of them". **The Constitution of the United States does not guarantee against the classification of people by economic status (cast system, if you must). But the Constitution does guarantee the protection of the ownership of private property and freedom in the use and operation thereof.** The Constitution does guarantee that all people may acquire such private property and such freedom in the use thereof by their energy, industry and effort, properly executed and pursued under law and with good business judgment. In other words, the opportunity to acquire property is guaranteed; but the control of private property is also guaranteed to those who have, by industry and hard work, used their opportunity to acquire such property.

In the concurring opinion of Mr. Justice Goldberg, at page 4, there is a position taken, with which counsel agrees in every respect, to wit:

**"Our sworn duty to construe the Constitution requires, however, that we read it to effectuate the intent and purposes of the Framers."**

**Who were the Framers of the Constitution of the United States?** Thomas Jefferson who wrote the Declaration of Independence was not there; neither was John Adams; both were on foreign missions. John Jay was not there. Samuel Adams and George Clinton were not there; not even the man who provided the political catalyst for freedom, namely, Patrick Henry. It was eleven years after the Declaration of Independence that 55 delegates assembled in Philadelphia in 1787 and adopted the Constitution of the United States. Only 39 of these 55 delegates subscribed to the Constitution of the United States by signing it. **Of the 39 delegates the following 15 owned over 400 Negro slaves:**

Butler, Davie, Jenifer, A. Martin, L. Martin, Mason, Mercer, C. C. Pickney, C. Pickney, Randolph, Read, Rutledge, Spaight, George Washington and Wythe.

Historically, Negro slaves were not regarded as persons in 1787 or in 1776 when the Declaration of Independence was proclaimed. **Certainly these Framers of the Constitution did not intend that any of the guarantees or provisions for personal liberties extended to their 400 Negro slaves.**

Of the 55 delegates to the Convention, 40 owned public security interests, as shown by the records of the Treasury Department, for sums varying up to one hundred thousand dollars. Of the delegates 14 members were involved in large land speculation; the speculations of Robert Morris of Pennsylvania ran into millions of acres. This class of delegates included Benjamin Franklin, George Washington and Alexander Hamilton. Twenty-four delegates owned

personalty in the form of money loaned at interest. The following eleven delegates were engaged in large scale mercantile, manufacturing and shipping businesses:

Broom, Clymer, Ellsworth, Fitzsimons, Gerry, King, Langdon, McHenry, Mifflin, G. Morris and R. Morris.

**Does anyone seriously think that these 11 wealthy merchants and ship owners ever had their first idea that a member of the Negro race had any right, under the Constitution which they were adopting, either to eat or sleep with these delegates at the taverns and inns existing in those days. And how about John Hancock whose signature on the Declaration of Independence every school child knows. He was the wealthy Boston merchant and the 18th Century radical and extremist who helped dump the tea in the Boston harbor. He and Sam Adams, later President of the United States, were the friends for whom Paul Revere made his nocturne ride to warn. Sam Adams and John Hancock of Massachusetts opposed the Constitution and were known in 1787 as anti-federalists. Can anyone seriously believe that John Hancock, the merchant, ever intended that members of the Negro race would have the right under the Constitution to demand that he serve them?**

The presiding delegate in the convention of 1787 was George Washington, of Virginia, who was probably the richest man in the United States in his time. He owned approximately 8,000 acres stretching 10 miles along the Potomac River. Of these 3,500 were under cultivation by Negro slaves. Washington owned Negro slaves who were blacksmiths, carpenters, brick layers; who operated stills and made barrels for his whiskey from home grown oak. George Washington even owned his own schooner in which he shipped flour turned out by his own grist mill. We submit that **George Washington did not intend that the new Constitution would provide any rights of personal freedom for his Negro slaves and certainly not the right to use the taverns and inns in which George Washington slept. While**

Washington was President, he traveled through most of the 13 original colonies and slept in many an inn but never encountered or expected to encounter Negro guests in such taverns or inns. We contend, therefore, that the Framers of the Constitution which were referred to by Mr. Justice Goldberg, did not intend to extend to members of the Negro race those rights which the Civil Rights Act of 1964 attempts to create.

Mr. Justice Goldberg then holds in his concurring opinion that the opinions stated by the courts following the adoption of the Thirteenth and Fourteenth Amendments to the Constitution clearly reflect the contemporary understanding of those times regarding the rights and privileges of the colored race. We concur with this position also and hasten to point out that in the *Civil Rights Cases* the Supreme Court of the United States held in 1883 that the Fourteenth Amendment to the Constitution did not confer upon the members of the Negro race the right to use public accommodations. Although there are quoted in the concurring opinion various statements from the *Civil Rights Cases*, the opinion ignores the ruling of the Court that the Fourteenth Amendment did not confer such rights upon Negroes. We submit that the Judges in 1883 were much more familiar with the feelings and intentions of those who supported the Fourteenth Amendment and that the legal interpretation of 1883 was and is correct.

#### **DISSENTING OPINION OF MR. JUSTICE BLACK IN BELL v. MARYLAND**

In the *Bell v. Maryland* case, there was a dissenting opinion rendered by Mr. Justice Black with which Mr. Justice Harlan and Mr. Justice White joined:

“The crucial issue which the case does present but which the Court does not decide is whether the Fourteenth Amendment, of itself, forbids a State to enforce its trespass laws to convict a person who comes into a privately owned restaurant, is told that because of

his color he will not be served, and over the owner's protest refuses to leave. We dissent from the Court's refusal to decide that question. For reasons stated, we think that the question should be decided and that the Fourteenth Amendment does not forbid this application of a State's trespass laws."

In the *Bell* case, the Court simply remanded the question to the Maryland State Court for further decision and, Mr. Justice Black's opinion dissented from that act of remanding the case on the grounds that the constitutionality of the Maryland anti-trespass laws should be decided, by holding that the Maryland anti-trespass law was not forbidden by the Fourteenth Amendment.

The theory of the Maryland anti-trespass law is diametrically opposed to the theory of the Civil Rights Act of 1964. The anti-trespass law permits a man to select his business guests and to refuse to serve anyone because of his color. The Civil Rights Act denies a man his right to select his guests or to refuse to serve a customer because of his color. If the anti-trespass law does not violate the Constitution of the United States and is not prohibited by the Fourteenth Amendment, then the Civil Rights Act of 1964 must, by all logic, violate the provisions of the Constitution of the United States, including the Fourteenth Amendment. Congress can not prohibit personal acts of individuals which are not prohibited by the Constitution, because Congress' power emanates from the Constitution.

The dissenting opinion goes on to say (page 9) that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful, *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). This well-established interpretation of Section 1 of the Amendment—which all the parties here, including the petitioners and the Solicitor General, accept—means that this section of the Amendment does not of itself, standing alone, in the absence of some cooperative state action or compulsion,

forbid property holders, including restaurant owners, to ban people from entering or remaining upon their premises, even if the owners act out of racial prejudice."

In the instant case, there are no allegations and no evidences of any State action of any kind supporting the individual and private choice of the appellant to refuse service to Negroes.

Before giving further consideration to the *Civil Rights Cases*, counsel would like to point out that in the case of *Patterson, et al. v. City of Greenville*, 373 U.S. 244, Chief Justice Warren said on page 247:

"It cannot be disputed that under our decisions 'private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it.' *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722; *Turner v. City of Memphis*, 369 U.S. 350."

and at page 250 Mr. Justice Harlan said:

"Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from government interference. This liberty would be overridden, in the name of equality, if the strictures of Amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority."

May we point out again, in connection with the *Patterson* case, that there is no State action involved in the instant case.

### THE LEGAL QUESTION

The constitutionality of the Civil Rights Act of 1964 is the legal issue raised by the complaint in the instant case. It is also true that Title II, known as the Public Accommodations Section, is that portion of the Civil Rights Act of 1964 under which the instant case arises. It is our contention that the entire Act is unconstitutional because Title II of the Act is unconstitutional, and the whole Act must fall in its entirety. However, the argument of this brief pertains only to the validity of Title II of the Civil Rights Act of 1964 and appellant will leave to the Court, without argument, the effect upon the entire Civil Rights Act of 1964 of the invalidity of Title II of said Act.

### THE FUNDAMENTAL ISSUE

The fundamental issue, however, in the instant case is not whether or not Congress has the right under the Constitution to create new rights for the members of the Negro race, as we contend Congress attempted to do, nor whether or not the Constitution of the United States guarantees such rights to such Negro citizens as contended by the government. The fundamental question is whether or not Congress has the power to take away the personal liberty of an individual to run his business as he sees fit with respect to the selection and service of his customers. This is the important issue and the fact that alleged civil rights of Negroes are involved is purely incidental because if the Congress can exercise these controls over the rights of individuals, it is plausible there is no limit to Congress' power to appropriate and destroy individual liberty and property.

The holding of the Supreme Court in the *Civil Rights Cases* was made known to the members of Congress during the arguments over the Civil Rights Act of 1964. They were advised that it had been held that the Fourteenth Amendment did not authorize such an Act. So in order to accomplish the end desired to establish certain rights under said Act for Negroes, said Act relies upon the Com-

merce Clause of the Constitution. **There is no relationship between the purposes of the Act and the means adopted to achieve the end.** The Act seeks to extend the power of Congress to regulate interstate commerce by declaring that all motels are part of interstate commerce. We submit that all motels are not part of interstate commerce and do not affect interstate commerce. We now wish to point out what the *Civil Rights Cases* held, what the Court said or did not say regarding interstate commerce and the historical background of the Commerce Clause in the Constitution.

### **CIVIL RIGHTS CASES**

The Congress of 1875 passed the Civil Rights Act which contained two sections. Section I is quoted hereinafter to show that it is almost identical with the substantive law of Title II of the Civil Rights Act of 1964:

"That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theaters and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."

Section II of the 1875 Act differs with the 1964 Act only in that penal sections were much more severe.

**The U. S. Supreme Court held in 1883 in said Civil Rights Cases as follows:**

"Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three Amendments."

"It (14th Amendment) does not invest Congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation or state action, of the

kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the Amendment."

"The Constitution prohibited the States from passing any law impairing the obligation of contracts. This did not give the Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts."

"Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of State Legislatures and to supersede them."

**"If this legislation is appropriate for enforcing the prohibitions of the Amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty and property?"**

"The truth is, that the implication of a power to legislate in this manner is based upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such state legislation or action. The assumption is certainly unsound. It is repugnant to the 10th Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

**"In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution**

against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual, an invasion of the rights of the injured party; it is true, whether they affect his person, his property or his reputation; but if not sanctioned in some way by the State, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. Any individual cannot deprive a man of his right to vote, hold property, to buy and to sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of state law or state authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed. Hence, in all of those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the states alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some state law or state authority for its excuse and perpetration."

"The law in question, without any reference to adverse state legislation on the subject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances and places of public amusement, and imposes a penalty upon any

individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances and places of amusement. It supersedes and displaces state legislation on the same subject, or only allows it permissive force. It ignores such legislation, and assumes that the matter is one that belongs to the domain of national regulation."

It is of passing interest also to note who these justices were. Plainly they had no Southern bias. Bradley, who wrote the opinion, was 70 years old in 1883, a native of New York, a Rutgers graduate, an ardent Unionist who publicly had denounced secession as treason. Samuel Blatchford, 63, also was a New Yorker, a Columbia graduate, formerly private secretary and later law partner of William H. Seward. The colorful Stephen J. Field, 66, a native of Connecticut, had been appointed from California. Horace Grey, 55, was a Bostonian, a Harvard graduate, a renowned scholar and jurist who had served many years on the Supreme Judicial Court of Massachusetts. Stanley Matthews, 59, was a native of Cincinnati, formerly the editor of an abolitionist newspaper, who had served as a colonel of Ohio infantry in the Union army. William Burnham Woods, 59, also an Ohioan, served as a Union officer at Shiloh, in the siege of Vicksburg, and Sherman's march to the sea. Samuel F. Miller, 67, started out to be a doctor in Kentucky, practiced medicine for 12 years, took up the law, and moved to Iowa where his emancipationist views were more acceptable. Chief Justice Morrison R. Waite, 66 was a native of Connecticut, a Yale graduate, a staunch Unionist who settled in Toledo and identified himself prominently with the Northern cause.

As to the reference of the Commerce Clause in the *Civil Rights Cases*, it is important to point out that the Court held that nothing was contained in the Constitution, before the adoption of the Thirteenth, Fourteenth and

Fifteenth Amendments, which could sustain the Civil Rights Acts of 1875 and in making that decision, the Court was, of course, aware of the existence of the Commerce Clause in the Constitution at that time.

Referring again to the dissenting opinion of Mr. Justice Black, it was pointed out that nothing cited in the concurring opinion of Mr. Justice Goldberg supported the proposition that the Fourteenth Amendment standing alone "prohibits owners of restaurants and other places to refuse service to Negroes". Mr. Justice Black further stated:

"And it is revealing that in not one of the passages cited from the debates on the Fourteenth Amendment did any speaker suggest that the Amendment was designed, of itself, to assure all races equal treatment at inns and other privately owned establishments."

Mr. Justice Black continued:

"We express no views as to the power of Congress, acting under one or another provision of the Constitution, to prevent racial discrimination in the operation of privately owned businesses, nor upon any particular form of legislation to that end."

#### **IS THERE ANY CONSTITUTIONAL BASIS FOR THE CIVIL RIGHTS ACT OF 1964?**

This now leads us inevitably to the question of whether or not Congress has the authority, under any other section of the Constitution, to pass such legislation as the Civil Rights Act of 1964. The Supreme Court of the United States in the *Civil Rights Cases* has held that the Fourteenth Amendment did not authorize legislation such as the Civil Rights Act of 1964. Mr. Justice Black, Mr. Justice White and Mr. Justice Harlan have indicated that they do not believe the Fourteenth Amendment authorizes such legislation. The Chief Justice has stated in the *Patterson* case, cited above, that such legislation is not authorized by the Equal Protection Clause". So, again, the question is

whether or not some other part of the Constitution supplies basis for the Civil Rights Act of 1964.

**Mr. Justice Black** in his dissenting opinion, we submit, put his finger on the whole issue in the following sentence:

“Precisely put, our position is that the Constitution of itself does not prohibit discrimination by those who sell goods and service.”

If the Constitution does not prohibit such discrimination, then the Congress has no power to enact such legislation against discrimination because all of the powers of Congress are derived from the Constitution and all other powers and rights under the Tenth Amendment are reserved to States respectively, or to the people.

#### THE COMMERCE CLAUSE

We now turn to the question of the awesome and fearful and consuming “commerce clause”. We have stated before that we agree with Mr. Justice Goldberg’s opinion that the Court should abide by the intents and purposes of the Framers of the Constitution. **A historical flash-back**, to use a modern term, will reveal that the Constitution adopted in 1787 arose out of the weakness of the Confederation which was our form of national government from its adoption in 1781 until the Constitution was ratified by the first nine states. The Confederation relied upon the good will of member states. It became so financially bankrupt that the Constitutional Convention in 1787 did not have enough money to pay a chaplain to open and close the meetings. By 1783, Robert Morris, the able finance minister of the Confederation, resigned in despair and said:

“It can no longer be a doubt . . . that our public credit is gone.”

By 1786 the country was in a severe economic depression. Continental securities were considered almost worthless. All attempts to give the Confederation limited taxing power

by amendment had failed. **Then interstate brawls began to take place.** In 1787 the State of New York increased custom duties on foreign merchandise and assessed heavy entrance and clearance fees on all vessels coming from or bound to New Jersey and Connecticut. New Jersey retaliated by taxing the lighthouse on Sandy Hook 30 pounds a month! The state of Virginia and the state of Maryland had long been fighting over Maryland's jurisdiction over the Potomac up to the Virginia shore. Pennsylvania and Delaware were also concerned because some of their commerce had to pass through Virginia's territorial waters. These conflicts between states regarding trade between states prompted Virginia's Assembly to call a **convention at Annapolis "to take into consideration the trade of the United States"**.

The Annapolis Convention met in 1786 but there were only five states represented. Alexander Hamilton and James Madison persuaded the convention to call another convention in which all the states would be represented and Hamilton delivered a report proposing the Constitutional Convention:

"to devise further provision as shall appear . . . necessary to render the Constitution of the federal government adequate to the exigencies of the Union".

**That was the genesis of the federal government of 1787.** The economy of the country was at a low ebb; trade between the states (interstate commerce, by another name) was greatly impeded and the preservation of the economic stability of the new United States was the principal concern.

Article I, Section 8, clause 3 of the Constitution, adopted at that convention in 1787 simply provides that Congress shall have the power:

"to regulate commerce with foreign nations, and among the several states and with Indian Tribes."

### PEOPLE ARE NOT COMMERCE

The commerce referred to by the Framers of the Constitution was the exchange of goods between states, the sale and delivery of products of agriculture and industry, the prices and tariffs of such trade, and the transportation of such goods between the states. The Framers of the Constitution were faced with no problem concerning the mobility of citizens because of restrictions applied to individuals. The barriers that impeded commerce at that time between the states were economic barriers that prevented the free flow of goods and not of people. **Persons and people are not a part of trade or commerce.** Persons and people are not the objects, the means or the end of trade or commerce. People conduct commerce and engage in trade, but people are not part of commerce and trade. In the case of *The Mayor, etc. of the City of New York v. Miln*, 9 L. ed., page 136, the court held that "they (persons) are not the subject of commerce", said case involving a New York state statute requiring reports of certain information regarding people entering the port of New York by ship. Even today, in the new Uniform Commercial Codes, which are being adopted by state after state, the subject matter includes sales, warehousing, titles, transportation, finance, security and enforcement of property rights—but nothing about people and personal liberties and nothing about alleged civil rights. No one knew better than Alexander Hamilton that the proposed noble and abstract principles of government would have never succeeded unless that government was supported by the financiers, bankers, merchants, manufacturers, and holders of the public debt.

In adopting the Civil Rights Act of 1964 Congress has simply said that commerce between the states includes the movement of people, and that since people use motels for sleeping purposes, all motels are therefore engaged in interstate commerce. But passing a law and stating that green is red does not necessarily make green red. The Civil

Rights Act of 1964 can find no source of authority in the Constitution. If the wants and desires of the Negro race, currently referred to as civil rights, can be forced upon other people, whose wants and desires are in direct conflict, by the mental gymnastics that all such desires are subject to the regulations of Congress because all people are part of interstate commerce, then there is no logical or foreseeable end to the extension of the power of Congress under the commerce clause. There will be no area left for the exclusive jurisdiction of state legislatures because the Congress can appropriate any field of law, since all areas of the law and all principles of law affect those same people that Congress would like to say are part of interstate commerce. Such an unwarranted extension of the power of Congress, based on an unlimited interpretation of the Commerce Clause would in effect destroy our Republican and Federal form of government. There can be no question but that the Civil Rights Act of 1964, if upheld, will be the straw that broke the camel's back. If such Act is upheld, the flood gates of federal power will be wide open and no one will ever again legally and peaceably be able to resist the onslaught of federal control by congressional legislation.

#### **THE FUNCTION OF THE SUPREME COURT IN THE FEDERAL SYSTEM**

Not only did the Constitution of the United States provide in the Tenth Amendment specifically that the federal government was one of limited powers set forth in the Constitution itself, as Mr. Justice Black has pointed out, but it was adopted by states with provisions included which were designed to carry out the intentions of the Framers to maintain local governments by the various states themselves. If the action of these states now can be pre-empted by federal legislation under the commerce clause, then our concept of the federal structure is destroyed and the delicate balance between the national and state government can no longer be maintained. **This Supreme Court of the**

United States has as its chief function the maintenance of the delicate balance between national and state governments by its very power to declare acts of either to be unconstitutional. If the state governments lose their autonomy and lose their right of legislation upon local affairs, then the reason for the existence of this Supreme Court no longer exists and this Court shall become superfluous. It is needless to point out that there are no organizations similar to the Supreme Court existing in the Soviet Union, where totalitarian democracy triumphs, at the cost of representative government.

If the Fourteenth Amendment does not authorize the Civil Rights Act of 1964 and if the Constitution offers no legal basis for such congressional action, then this Act is a gross taking of the freedom and private rights of individuals. None other than George Washington, in his farewell address on September 17, 1796 warned against such usurpation as follows:

"It is important, likewise, that the habits of thinking in a free country should inspire caution in those intrusted with its administration to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism . . . If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this is one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly over-balance in permanent evil any partial or transient benefit which the use can at any time yield."

The most authoritative treatise about the Constitution is the group of writings called *The Federalist* which were

written by Hamilton, Madison and Jay. They give a complete, adequate and accurate presentation of the views of the Framers of the Constitution. Madison in *The Federalist*, No. 48, said:

"The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex. The founders of our republic . . . seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority."

*The Federalist* posed the question of how the legislative body, who could court the favor of strong interests and organized groups of the public by unjust legislation, could be curbed by the Constitution itself and Madison proposed, in *The Federalist*, No. 51, that:

". . . the defect must be supplied by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places . . . It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."

On the subject of judicial control over legislation under the Constitution, Hamilton enumerated the advantages to be derived out of it in *The Federalist*, No. 78, which reads in part as follows:

"In a monarchy it (judicial control) is an excellent barrier to the despotism of the prince; in a republic it is no less an excellent barrier to the encroachments and oppressions of the representative body. . . . If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachment, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to the

independent spirit in the judges which must be essential to the faithful performance of so arduous a duty . . . But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of private rights of particular classes of citizens, by unjust and partial laws. Here also the affirmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon a character of our governments than but few may be aware of."

#### REBUTTAL TO ARGUMENTS OF THE GOVERNMENT

The theory advanced in the trial Court by the Government, both orally and in brief, was that Congress in passing the Civil Rights Act of 1964 was simply exercising its full power under the commerce clause. **If that is the theory of our government now, then Congress can do no wrong and can legislate on any and all matters affecting people on the grounds that they are part of interstate commerce.** The next act of Congress would include the corner drug store, the hardware store, and the grocery store. Then the next act of Congress would include churches and private clubs and fraternal organizations, masonic, social or otherwise. Then the next act of Congress, in the exercise of its full power under the commerce clause, could include your home—and then we shall have arrived at the full and complete socialistic state that the Framers of the Constitution despised, dreaded and detested. The government cited, and we are sure will

cite in their brief to this Court, many, many cases which show the gradual erosion which has already taken place concerning private rights, personal freedom and the inalienable right of any individual to use his personal property and to run his business as he sees fit. The government points out the decisions which have upheld the anti-trust laws affecting businesses engaged in interstate commerce or which materially affect interstate commerce. At least, these decisions applied the anti-trust acts on the basis of involvement in trade between the states or in such acts that affected "materially" trade flowing from one state to another. The government also relies on the many decisions regarding wage and hour legislation which find their roots in the commerce clause. But at least, wage and hour laws pertain only to certain businesses that meet such requirements as set out in the laws, such as a minimum volume business of so many hundreds of thousands of dollars. Whereas, the Civil Rights Act of 1964 says that all motels are part of interstate commerce without meeting any specified standards to so classify them. The government also relies on many cases upholding decisions of the National Labor Relation Board as an agency of Congress deriving its power to regulate from the alleged power of the commerce clause. Again, at least the National Labor Relation Board does not assert jurisdictions over all businesses; whereas the Civil Rights Act of 1964 covers all motels. In 1958 in the case of *Hotels Employees Local 255 v. Leedom*, 358 U.S. 143, this Court first held that the National Labor Relations Board could not refuse to take jurisdiction over labor disputes in hotels and motels "as a class"; but the application of the N.L.R.B. jurisdiction has been applied only where the particular hotel affected interstate commerce.

### CURRENT SUPPORTING AUTHORITIES

Fortunately, there is no unanimity among lawyers and legislators and courts as to the unlimited power of Congress to control all people, about any subject which Congress selects. In the case of *U. S. v. Yellow Cab Company*, 332 U.S. 218, there was involved the transportation by **taxi cabs** of people from railroad stations in Chicago to their homes, offices and hotels, and vice versa. The question before the court was whether or not such transportation was part of interstate commerce. The court held as follows:

"We hold, however, that such transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act. These taxicabs, in transporting passengers and their luggage to and from Chicago railroad stations, admittedly cross no state lines; by ordinance, their service is confined to transportation."

"In short, their relationship to interstate transit is only casual and incidental."

"But interstate commerce is an intensely practical concept drawn from the normal and accepted course of business."

"We must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical considerations."

"Here we believe that the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination."

If the transportation by taxi cabs of out-of-state residents or travelers from a railroad station or an airport to a motel is not part of interstate commerce, then how can anyone logically urge that the hotel or motel to which he is transported is involved in interstate commerce?

In *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845 (C.A. 4th 1959), a Negro attorney in the Internal Revenue Department brought suit in federal court against a **Howard Johnson restaurant** located on an interstate highway, based upon the restaurant's refusing him service because of his race. Reliance was placed on the Civil Rights Act of 1875 and the Commerce Clause. The Court of Appeals rejected both contentions, pointing out that the 1875 Act had been held unconstitutional in the *Civil Rights Cases*, and as to the Commerce Clause argument, it was said:

"The plaintiff makes the additional contention based on the allegations that the defendant restaurant is engaged in interstate commerce because it is located beside an interstate highway and serves interstate travelers. He suggests that a Federal policy has been developed in numerous decisions which required the elimination of racial restrictions on transportation in interstate commerce and the admission of Negroes to railroad cars, sleeping cars and dining cars without discrimination as to color; and he argues that the commerce clause of the Constitution (Article I, Section 8, Clause 3), which empowers Congress to regulate commerce among the states is self-executing so that even without a prohibitory statute no person engaged in interstate commerce may place undue restrictions upon it."

"The cases upon which the plaintiff relies in each instance disclosed discriminatory action against persons of the colored race by carriers engaged in the transportation of passengers in interstate commerce. In some instances the carrier's action was taken in accordance with its own regulations, which were declared illegal as a violation of paragraph 1, section 3 of the Interstate Commerce Act, 49 U.S.C.A. § 3 (1), which forbids a carrier to subject any person to undue or unreasonable prejudice or advantage in any respect, as in *Mitchell v. United States*, 313 U.S. 80, 61 S. Ct. 873, 85 L. Ed. 1201, and *Henderson v. United States*, 339 U.S. 816, 70 S. Ct. 843, 94 L. Ed. 1302. In other instances, the carrier's action was taken in

accordance with a state statute or state custom requiring the segregation of the races by public carriers and was declared unlawful as creating an undue burden on interstate commerce in violation of the commerce clause of the Constitution, as in *Morgan v. Com. of Virginia*, 328 U.S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317; *Williams v. Carolina Coach Co.*, D.C. Va., 111 F. Supp. 329, affirmed 4 Cir. 207 F. 2d 408; *Flemming v. S. C. Elec. & Gas Co.*, 4 Cir., 224 F. 2d 752; and *Chance v. Lambeth*, 4 Cir., 186 F. 2d 879."

"In every instance the conduct condemned was that of an organization directly engaged in interstate commerce and the line of authority would be persuasive in the determination of the present controversy if it could be said that the defendant restaurant was so engaged. We think, however, that the cases cited are not applicable because we do not find that a restaurant is engaged in interstate commerce merely because in the course of its business of furnishing accommodations to the general public it serves persons who are traveling from state to state. As an instrument of local commerce, the restaurant is not subject to the constitutional and statutory provisions discussed above, and thus, is at liberty to deal with such persons as it may select. Our conclusion is, therefore, that the judgment of the District Court must be affirmed." (268 Fed. 2d 845).

"This principle was later restated and applied in the case of *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124 (D.C. Md. 1960), aff'd, 284 F. 2d 746 (C.A. 4th 1960)."

If a restaurant is not engaged in interstate commerce merely because it furnishes accommodations to people traveling from state to state, by what logic can a motel be held to be in interstate commerce because it furnishes accommodations to people who are traveling from state to state?

It has also been held with respect to the bowling alley business that local business activities cannot be reached or regulated by the federal government under its power

to regulate interstate commerce even though the business drew trade from, advertised in and received equipment from other states. See *Lieberthal v. North Country Lanes, Inc.*, 221 F. Supp. 685, 688 (S.D.N.Y. 1963). In the words of the district court:

" . . . incidental flow of supplies in interstate commerce to the local enterprise, or *travel in interstate commerce of customers of the local enterprise*, or soliciting business in other states for the local enterprise did not make the local enterprise a part of interstate commerce under the Sherman Anti-Trust Act." (Emphasis added.)

#### INTERSTATE COMMERCE BY INFECTION

We would like to anticipate the theory upon which the government will also rely to sustain this act under the Commerce Clause, that is, that since Heart of Atlanta Motel serves interstate travelers and since the Heart of Atlanta Motel buys supplies that come from states outside of Georgia and since Heart of Atlanta Motel seeks guests from out of state by means of advertising by media which go outside the state of Georgia, therefore Heart of Atlanta Motel is engaged in interstate commerce. This is nothing more than a theory of "**interstate commerce by infection**". For example, suppose an out-of-state traveler comes to Atlanta, Georgia by airplane. He first goes by taxi cab to the First National Bank of Atlanta to arrange for a construction loan for his business. He then goes to a local real estate firm to sign a contract for the purchase of land in Atlanta. He then goes to a purely local contractor and signs a construction contract for a new building. He has lunch at the Commerce Club (luncheon club), dinner at the Piedmont Driving Club (social club), is entertained at Wits End (night club), and finally goes to Heart of Atlanta Motel and rents a room for the evening. The question is: Does that interstate traveler infect all of those businesses with interstate commerce and subject all of those businesses completely


to the control of Congress under the Commerce Clause? We suggest that the interstate commerce of this hypothetical traveler terminated when he arrived at the Atlanta airport; that his activities in Atlanta were of a purely local nature involving local transactions; and that he simply came to the Heart of Atlanta Motel to rest. We submit that any other traveler coming to plaintiff's motel ceases to be in the stream of interstate commerce, whether he makes other stops in Atlanta or in Georgia first or whether he comes directly to the motel, because it is his intention to end his trip.

If every local grocery store who buys oranges from Florida, if every lawyer who buys pencils from Pennsylvania, if every doctor who buys instruments from Connecticut can be said to be in interstate commerce because they purchase something that they use in their business which comes from outside of Georgia, then the commerce clause has been stretched to include all phases of business and Congress can appropriate any field of legislation and exclude from such area of law all actions by all local governments.

If the theory of "interstate commerce by infection" prevails and if the interstate commerce clause can be stretched to include any business or person who buys something from outside the state, then we as a people have lost all rights of self-government in the attempt of Congress to force one man to accept another by the passage of the Civil Rights Act of 1964, which is based on the interstate commerce clause.

The "modern trend" of affairs referred to by Mr. Justice Douglas and so brilliantly illuminated by the cases cited by the Government should give any thoughtful American pause to wonder whether it is not now too late to heed the trenchant remarks of Woodrow Wilson that:

"The history of the development of freedom is the history of the limitation of the power of the government and not the growth thereof."



## THE CIVIL RIGHTS ACT OF 1964 AND THE FIFTH AMENDMENT

Not only does the Fourteenth Amendment not authorize the Civil Rights Act of 1964, not only does the Constitution of the United States not prohibit discrimination by individuals which is prohibited by said Act, and not only does the commerce clause not authorize said Act, but the Constitution itself expressly prohibits the inevitable and inherent consequences of said Act, namely (1) the taking of liberty and property without due process and the taking of private property for public use without just compensation, in violation of the Fifth Amendment to the Constitution and (2) the forcing of involuntary servitude upon literally thousands of people, in violation of the Thirteenth Amendment to the Constitution.

The Fifth Amendment reads in part as follows:

“ . . . nor (shall any person) be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

It has long been settled that the taking of any right of ownership of private property is the taking of property under the law. These questions have been settled by many cases involving condemnations and the right to eminent domain. **The right to use one's property as that owner sees fit is a property right and the taking of that right is a taking of property.** This right of ownership to use one's property as one sees fit is a fundamental principle underlying the private enterprise system created and nurtured under the laws of the United States over a long period of history.

**Is there a taking of liberty by virtue of the prohibition of the Civil Rights Act of 1964?** Liberty is the free exercise of the will of man, subject only to the restrictions for the public good and the concern of all men, not just one class of man. The prohibition of said Act interferes

with the liberty of the plaintiff to choose its customers for whatever reason, which was the liberty that plaintiff had before the passage of the Civil Rights Act of 1964 and which is now prohibited thereby.

**Was the taking of this property right and this liberty without due process?** If the taking is not authorized by a constitutional statute then the taking is without due process. Certainly the procedural due process has not been observed.

The U. S. Court of Appeals of the Fifth Circuit, in January 1964 in the case of *Hornsby v. Allen, et al.*, defined due process at length. The Court held that there must be a responsible finding, after a hearing with adequate notice, at which hearing the parties would have the opportunity to be present and to present evidence and to cross-examine witnesses; and that the findings must conform to the evidence adduced at the hearing. We submit that there has been a taking of the property rights and the liberty described herein and in the plaintiff's Complaint, without any hearing or responsible findings. Congress simply decided that they would take the property and liberty of the plaintiff and others similarly situated.

The Fifth Amendment further provides for just compensation for the taking of private property for public use. Certainly no compensation is provided in the Civil Rights Act of 1964 or in any other act of Congress for the taking complained of. We contend that the taking of private property has been for the purpose of devoting it to public use, that is, for the use of all people without restriction. We contend that such use without restriction is public use.

There can be no questioning of the fact that the power of Congress to regulate interstate commerce is subject to the limitations embraced by the "due process" clause. *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604, 616-17 (1950); *Boylan v. United States*, 310 F. 2d

493, 498 (9th Cir. 1962). It is also beyond dispute that the constitutional guarantee against the taking of property without due process of law embraces everything over which a man may have exclusive control or dominion and all character of vested rights. *Buchanan v. Warley*, 245 U.S. 60, 74 (1917).

In a recent Washington case, *O'Meara v. Washington State Board Against Discrimination*, 365 P. 2d 1, 6 Race Rel. L.R. 1109 (1961), a Washington statute banning discrimination in the sale of housing accommodations financed through public assistance was declared unconstitutional. A concurring judge declared:

"This constitutional right of the individual not to be dominated in his private affairs is predicated upon the theory that the greatest good for the greatest number can be best achieved by permitting the individual to choose his own course of action, conforming, of course, to the reciprocal rights of others.

"\* \* \* In dealings between men, both cannot be free unless each acts voluntarily, otherwise one is subjected to the other's will." *Browning v. Slenderella Systems of Seattle*, 54 Wash. 2d 440, 341 P. 2d 859, 868.

"Until our constitution is amended, we must forego the benefits of regimentation with which other parts of the world are blest.

"Thus, a white man may exercise his constitutional right to choose his own course of action in his private affairs by making a voluntary sale of his home in an exclusive district to a Negro. Neighbors cannot disturb him in his private affairs by having him enjoined from doing so. So also, if a white man refuses to sell his home to a Negro, his constitutional right not to be disturbed in his private affairs shields him from coercion on the part of the Negro."

(6 Race Rel. L.R. 1116).

In a prior case, *Browning v. Slenderella Systems of Seattle*, 54 Wash. 2d 440, 341 P. 2d 859, 4 Race Rel. L.R.

701 (1959), the Washington Supreme Court had considered a case involving an award of damages to a Negro woman under the Washington Public Accommodations Statute for refusal to serve her in a beauty salon. While the question as to the constitutionality of this law was not before the Court, a dissenting judge stated the proposition so clearly that I hasten to repeat it here, viz.:

"All persons familiar with the rights of English speaking peoples know that there liberty inheres in the scope of the individual's right to make uncoerced choices as to what he will think and say; to what religion he will adhere; what occupation he will choose; where, when, how and for whom he will work, and generally to be free to make his own decisions and choose his courses of action in his private civil affairs. The constitutional rights of lawabiding citizens are the very essence of American Liberties."

The plaintiff has alleged in its Complaint, as amended, that the freedom of contract is guaranteed by the Fifth Amendment. This is an often stated principle, but it is simply another way of saying that a man who owns a business, which is purely local in nature, has the right to pick and choose his customers as he sees fit and without any restrictions by the federal government.

#### **CIVIL RIGHTS ACT OF 1964 AND THIRTEENTH AMENDMENT**

The Civil Rights Act of 1964 is unconstitutional because it violates the Thirteenth Amendment to the Constitution of the United States. The long established policy and practice of Heart of Atlanta Motel has been to refuse to rent accommodations to any Negroes (R. 7). As alleged in plaintiff's Complaint, this policy was adopted and pursued as in the best interest of plaintiff's business and as necessary to protect plaintiff's property, trade, profits and reputation (R. 8). In other words plaintiff chose, and now chooses not to serve Negroes. The Civil Rights

Act of 1964 demands that plaintiff serve Negroes. This, we contend, subjects plaintiff to involuntary servitude.

Almost fifty years ago the Supreme Court of the United States, in *Hodges v. United States*, 203 U.S. 1 (1906), declared:

"Slavery and involuntary servitude as denounced by the Thirteenth Amendment means a condition of enforcement of compulsory service of one to another; and while the cause inciting that amendment was the emancipation of the colored race, it reaches every race and every individual."

It was the purpose of the Thirteenth Amendment not only to end slavery, but to maintain a system of completely free and voluntary labor throughout the United States. *Pollock v. Williams*, 322 U.S. 4, 17 (1944); see also *Corrigan v. Buckley*, 271 U.S. 323 (3) (1926).

In the case of *Ex parte Drayton*, 153 Fed. 986, 991, the Court observed that:

"to compel one person to labor for another against his will is legalized thralldom."

In the case of *Bailey v. Alabama*, 219, 240-41 (1911), the Court held as follows:

"The language of the Thirteenth Amendment was not new. It reproduced the historic words of the ordinance of 1787 for the government of the Northwest Territory and gave them unrestricted application within the United States and all places subject to their jurisdiction. While the immediate concern was the African slavery, the Amendment was not limited to that. It was a charter of universal freedom for all persons, of whatever race, color or estate, under the flag . . .

"The plain intention was . . . to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude."

The U. S. Court of Appeals in Chicago in the case of *Arthur v. Oakes*, 63 Fed. 310, pp. 317-18 (7th Cir. 1894), held:

**"It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude."**

Nor does the fact that the person, compelled to render services or to perform labor for another, receives payment affect the nature of such services or labor as being involuntary servitude. As stated by the Fifth Circuit in *Heflin v. Sanford*, 142 F. 2d 798, 799 (5th Cir. 1944):

**"Whether appellant was paid much, or little or nothing, is not the question. It is not uncompensated service, but involuntary servitude which is prohibited by the Thirteenth Amendment. Compensation for service may cause consent, but unless it does it is no justification for forced labor."**

It is recognized that one might reply by pointing out that the barber, porter restaurateur, waiter, etc. is always free to disengage from his occupation, and hence the servitude is not "involuntary". But while a plausible answer on the surface, such a reply is defective in two significant respects. First of all, it ignores the fundamental and even inherent right of any free person to obtain a living in any of the common occupations of society. Thus, it was stated by the United States Supreme Court in *Traux v. Aaich*, 239 U.S. 33, 41 (1915):

**"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure."**

In the *Peonage Cases*, 123 Fed. 671, the Court spoke of the right to work as follows:

**"One of the most valuable liberties of man is to work where he pleases, and to quit one employment and to go to another, subject, of course, to civil liability for breach of contract obligations. These laws attempt to take this right away and destroy this liberty."**

To deprive a person of this basic right to pursue his calling, a right just as fundamental to his life and liberty as such other high priority freedoms, to wit, freedom of speech and freedom of religion, unless he furnishes labor or services for certain individuals for whom he does not desire to work is obviously coercion if not outright punishment. **When an individual is either coerced into working for another or punished for failure to do so, the inescapable conclusion is that such employment amounts to involuntary servitude.**

In *Robertson v. Baldwin*, 165 U.S. 275 (1897), Mr. Justice Harlan of that Court, dissenting from the Court's opinion, wrote that:

**"the condition of one who contracts to render personal services in connection with the private business of another becomes a condition of involuntary servitude from the moment he is compelled against his will to continue in such service."**

The Cornell Law Quarterly, Volume 49, No. 2, Winter, 1964, contains the most comprehensive collection of cases and arguments probably ever assembled regarding the Thirteenth Amendment. The article is entitled "Freedom Of Choice In Personal Service Occupations: Thirteenth Amendment Limitations On Antidiscrimination Legislation" and appears on pages 228-256. The author, Alfred Avins, makes this rather worldly comment on page 240:

**"The thirteenth amendment gives every person the right to refrain from working for any other person.**

It protects barbers, hotel clerks, shoe-shine man, sales clerks, waiters and waitresses, just as much as it protects cotton-pickers, field hands, or farm laborers. A waitress can no more be required to wait on all persons who come into her shop without discrimination than can a cotton-picker be required to pick cotton for all who want to hire him, without discrimination. The thirteenth amendment guarantees the right to refrain from work, from all work, from some work, or from work for some people. To coerce personal service is to impose involuntary servitude."

We think that the comments of Judge Mallory of the Washington State Supreme Court in the *Slenderella Systems* cases are so profound that at least the following part is worthy of repeating in closing:

"Discrimination is but another word for free choice. Indeed, he would not be free himself if he had no right so to do. In dealings between men, both cannot be free unless each acts voluntarily, otherwise one is subjected to the other's will."

This appellant, under the mandates of the Civil Rights Act of 1964 must make the choice of going out of business or going to jail in the person of its officers or serving Negro customers. In fact, there is no choice and the Act imposes involuntary servitude upon the appellant.

### CONCLUSION

We submit that the appellant is entitled to the permanent injunction for which it prayed in its complaint, and for the following relief:

- (1) That Title II of the Civil Rights Act of 1964 be declared unconstitutional.
- (2) That the entire Civil Rights Act of 1964 be declared unconstitutional.

- (3) That the Attorney General of the United States of America be permanently enjoined from enforcing said Civil Rights Act of 1964 against appellant.
- (4) That appellant be awarded reasonable attorney's fee for the prosecution of this action and all cost, as prayed.

**MORETON ROLLESTON, JR.**  
*Attorney for Appellant*

**Post Office Address:**

**1103 Citizens & Southern National Bank Building  
 Atlanta, Georgia 30303**

## APPENDIX

[fol. 115]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

Civil Action No. 9017

HEART OF ATLANTA MOTEL, INC., a Georgia corporation,  
Plaintiff,

—versus—

THE UNITED STATES OF AMERICA and ROBERT F. KENNEDY  
as the Attorney General of the United States, Defendant.

OPINION—July 22, 1964

This is a complaint filed by Heart of Atlanta Motel, a large downtown motel in the city of Atlanta, regularly catering to out of state guests, praying for a declaratory judgment and injunction to prevent the Attorney General of the United States from exercising powers granted to him under the Civil Rights Act of 1964, 42 U. S. C. A., Section 1971, as amended. The suit also attempts to obtain recovery from the United States for substantial damages alleged to result from a partial taking of the complainant's property without just compensation.

Conceding, as it does, that it is regularly engaged in renting sleeping accommodations to out of town guests, seventy-five percent of whom come from without the state of Georgia, and that it "has refused and intends to refuse to

rent sleeping accommodations to persons desiring said accommodations, for several different reasons, one of which is based on the grounds of race, unless ordered by this Court to comply with the provisions of the Civil Rights Act of 1964," the suit attacks the constitutionality of the public accommodations sections of the Civil Rights Act as applied to such a motel.

Since this is a suit seeking an injunction against the enforcement of a Federal statute on the alleged grounds that it is in violation of the United States Constitution, a three-judge court was convened as provided for in 28 U. S. C. A., Section 2282.

[fol. 116] The Attorney General filed a counterclaim seeking, on behalf of the United States, a temporary and permanent injunction against future violation of the Civil Rights Act by the plaintiff. The case was set down for hearing, and after the introduction of oral testimony on behalf of the United States, the signing of stipulations between the parties, and oral statements made by counsel for the plaintiff in open court, it appeared that no factual issues remained. The parties also conceded in open court that the matter might be treated as a hearing on the petition for the final permanent injunction.

In the first place, the claim of the plaintiff for damages against the United States on the alleged ground of deprivation of property without just compensation alleges no grounds for relief, entirely aside from the question whether such alleged deprivation would be justified by reason of the power of Congress to enact this particular legislation. This is so, because such a claim for damages or recovery for value of property taken by the Federal Government must be asserted in the United States Court of Claims unless the amount sought is not in excess of \$10,000. However, in the view we take of the law, such a suit is not maintainable in any event.

The real question presented by this complaint and counterclaim is whether Section 201(a), (b), (1) and (c) is constitutional.<sup>1</sup>

[fol. 117] In substance, this section of Title II declares the right of every person to full and equal enjoyment of the goods, services and facilities of any hotel or motel which provides lodging to transient guests if it contains more than five rooms for rent or hire. The section is a congressional ascertainment and declaration of the fact that such "an establishment affect(s) commerce within the meaning of this Title."

Article I, Section 8, of the Constitution provides:

"Clause 1: The Congress shall have power . . . Clause 3: to regulate commerce with foreign nations and among the several states, and with the Indian tribes;" and Clause 18 "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . . ."

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<sup>1</sup> "Sec. 201.(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion or national origin.

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence; . . . .

"(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); . . . ."

In *United States v. Darby*, 312 U.S. 100, 118, the Supreme Court said:

"The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the grant of power of Congress to regulate interstate commerce. See *McCullough v. Maryland*, 4 Wheat 316, 421."

Thus, it need not be decided whether the outlawing of racial discrimination by a hotel accepting transient guests may be justified on the ground that it is actually in the stream of commerce. The power of Congress, when that body seeks to occupy the full extent of its powers under the Constitution, "extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to . . . the exercise of the granted power of Congress to regulate interstate commerce." Of course, the initial determination of whether the challenged regulation is such "appropriate means" is for Congress. Courts may not overturn such determination unless they conclude that under no reasonable theory could Congress find them "appropriate to the attainment" of its power to regulate commerce.

This Court, as recently as July 10, 1964, in the case of *Marriott Hotels of Atlanta, Inc. v. Heart of Atlanta Motel, Inc.*, C.A. No. 8832, held that the operations of Heart of Atlanta Motel (1) are in the stream of commerce, and that, in any event, (2) such operations affect commerce so as to [fol. 118] subject it to Congressional regulation under the Sherman Antitrust Act. It being undisputed that in the adoption of the Civil Rights Act of 1964, Congress has seen fit to exercise its full power as granted it under the Constitution the scope of its operation in this field must, therefore, be taken to be at least as broad as that which it exer-

cised in the adoption of the Sherman Act. Its scope is, therefore, also as broad as in the legislation affecting labor relations under the National Labor Relations Act. It is broader than that exercise by Congress in its regulation of wages and hours of services under the Wage and Hour laws.

In the specific field of hotel operations, the Supreme Court has ruled that the National Labor Relations Board could not lawfully follow a policy of refusing to take jurisdiction over unfair labor practices and other labor disputes in hotels and motels as a class. *Hotels Employees Local No. 255 v. Leedom*, 358 U.S. 99. Following that decision, the Court of Appeals of this judicial circuit in *N.L.R.B. v. Citizens Hotel Co.*, 5 Cir., 313 F. 2d 708, overruled a contention by the Citizens Hotel Company, operator of the Texas Hotel in Fort Worth, Texas, that its operations did not fall within the constitutional reach of the National Labor Relations Act because it was not either engaged in commerce, nor did its operations affect commerce. In arriving at that decision the court referred to the Supreme Court's opinion in *National Labor Relations Board v. Reliance Fuel Oil Corp.*, 371 U.S. 224. That case dealt with an attack by the local fuel oil corporation on the jurisdiction of the Labor Board because, while most of the products sold by Reliance had been acquired from Gulf Oil Corporation and had been delivered to it from without the state of New York, they nevertheless had been received and stored in the state before sales were made to Reliance. It was thus contended that Reliance was not engaged in commerce nor were its operations such as to affect commerce within the constitutional sense. The Supreme Court said:

"That activities such as those of Reliance affect commerce and are within the constitutional reach of Congress is beyond doubt. See e.g. *Wickard v. Filburn*, 317 U.S. 111."

The opinion also significantly quoted from the court's earlier decision in *Polish Alliance v. Labor Board*, 322 U.S. where, at page 648, it had said:

[fol. 119] "Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be merely local, but in the interlacings of business across state lines adversely affect such commerce."

It is clear that the attack by the complainant on the constitutionality of these sections of the Civil Rights Act must fail. It is equally clear that the United States is entitled to the injunction prayed for by it in its counterclaim. An injunction will issue in the following terms:

[fol. 120] ORDER—July 22, 1964

The plaintiff, Heart of Atlanta Motel, Inc., a corporation, its successors, officers, attorneys, agents and employees, together with all persons in active concert or participation with them, are hereby enjoined from:

(a) Refusing to accept Negroes as guests in the motel by reason of their race or color;

(b) Making any distinction whatever upon the basis of race or color in the availability of the goods, services, facilities, privileges, advantages or accommodations offered or made available to the guests of the motel, or to the general public, within or upon any of the premises of the Heart of Atlanta Motel, Inc.

So that the plaintiff may have an opportunity to prepare its record for appeal and, if so advised, seek a stay of this order, it is Ordered that the foregoing injunction shall become effective twenty (20) days from the date hereof, on, to-wit, the 11th day of August, 1964.

This 22nd day of July, 1964.

Elbert P. Tuttle, United States Circuit Judge, Frank  
A. Hooper, United States District Judge, Lewis R.  
Morgan, United States District Judge.

[fol. 121]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

Civil Action No. 9017

[Title omitted]

PERMANENT INJUNCTION—July 23, 1964

Pursuant to Order and Directions by the Three-Judge Court in the above stated case, and pursuant to Rule 58 of the Rules of Civil Procedure as amended January 21, 1963, the following Order in the above stated case on the prayers for temporary injunction is hereby entered.

## ORDER

The plaintiff, Heart of Atlanta Motel, Inc., a corporation, its successors, officers, attorneys, agents and employees, together with all persons in active concert or participation with them, are hereby enjoined from:

(a) Refusing to accept Negroes as guests in the motel by reason of their race or color;

(b) Making any distinction whatever upon the basis of race or color in the availability of the goods, services, facilities, privileges, advantages or accommodations offered or made available to the guests of the motel, or to the general [fol. 122] public, within or upon any of the premises of the Heart of Atlanta Motel, Inc.

So that the plaintiff may have an opportunity prepare its record for appeal and, if so advised, seek a stay of this Order, it is Ordered that the foregoing injunction shall become effective twenty (20) days from July 22, 1964, to-wit, the 11th day of August, 1964.

This the 23rd day of July, 1964.

B. G. Nash, Clerk of Court.